

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

[illegible]

Re: Fam. Ct. No. S60/1999

BEFORE: CURTIS V. GÓMEZ, Chief Judge of the District Court of the Virgin Islands; RAYMOND L. FINCH, Judge of the District Court of the Virgin Islands; and JULIO A. BRADY, Judge of the Superior Court of the Virgin Islands, Division of St. Croix, sitting by designation.

ATTORNEYS:

Kenth W. Rogers, Esq.
St. Thomas, U.S.V.I.
For petitioner

Carol S. Moore, AAG
St. Thomas, U.S.V.I.
For respondent Virgin Islands Dept. of Justice
Paternity and Child Support Division

Tamarah Parson-Small, Chief Legal Counsel
St. Thomas, U.S.V.I.
For respondent Virgin Islands Bureau of Internal
Revenue

Verne A. Hodge, Jr., Esq.
St. Thomas, U.S.V.I.
For nominal respondent Hon. Ive Arlington Swan

MEMORANDUM OPINION

PER CURIAM,

Petitioner Theodore Bartlette ("Bartlette") has filed a petition for a writ of mandamus. Bartlette requests that this Court enter an order directing Judge Ive Arlington Swan, Judge of the Superior Court¹ of the Virgin Islands, Division of St. Thomas and St. John (the "Superior Court"), to do the following:

¹ During a portion of the time relevant to this writ of mandamus, the trial court was known as the Territorial Court of the Virgin Islands and its judges were referred to as Territorial Court Judges. Effective January 1, 2005, however, the name of the Territorial Court changed to the Superior Court of the Virgin Islands. See Act of Oct. 29, 2004, No. 6687, sec. 6, § 2, 2004 V.I. Legis. 6687 (2004). Recognizing this renaming, we employ the terms Superior Court and Superior Court Judge.

1. Dismiss the action for child support that is currently pending in the Superior Court, *Government of the Virgin Islands, ex. rel. Barbara Dalmida v. Theodore Bartlette*, Family No. S60/1999 ("*Dalmida v. Bartlette*"), based on an agreement purportedly memorializing a voluntary support arrangement between Barbara Dalmida ("*Dalmida*") and Bartlette, (the "Support Agreement" or the "Agreement");
2. Enter an order directing the Superior Court to immediately return the \$5,557 supersedeas bond Bartlette posted to stay proceedings in *Dalmida v. Bartlette* pending the appeal that Bartlette voluntarily dismissed;
3. Order the Virgin Islands Bureau of Internal Revenue ("IRB") to cancel any withholding of Bartlette's tax returns imposed to recover child support payments owed by Bartlette pursuant to *Dalmida v. Bartlette*; and
4. Order the United States Virgin Islands Department of Justice Paternity and Child Support Division ("PCSD") to withdraw any notifications to credit bureaus indicating that Bartlette is delinquent in making child support payments owed pursuant to *Dalmida v. Bartlette*.

For the reasons explained below, the Court will dismiss the petition as to the PCSD and the IRB. Regarding Judge Swan, the Court will deny the petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a long series of child support proceedings. Beginning on February 9, 1999, Dalmida petitioned the PCSD to establish that Bartlette was the father of her child and to recover child support payments from Bartlette. Even after paternity tests determined that Bartlette was 99.95% likely to be

the child's father, Bartlette denied paternity. In September, 1999, the PCSD filed *Dalmida v. Bartlette*, in the Superior Court on behalf of Dalmida. Further paternity tests were conducted pursuant to *Dalmida v. Bartlette*, all of which confirmed that Bartlette was the father. On November 29, 2000, the Superior Court adjudged Bartlette to be the father of the child and transferred the case to the PCSD to determine the amount of Bartlette's child support payments.²

In early December, 2000, the PCSD Hearing Officer issued a temporary order ("the Temporary Order") stating, *inter alia*, that: (i) Bartlette was the father of the child; (ii) starting December 1, 2000, Bartlette must pay \$452.00 per month directly to the PCSD as temporary support for the child, otherwise that amount would be withheld by wage deduction effective December 5, 2000; and (iii) any money or payment of any kind given directly to Dalmida or the child would be considered a gift and would not be credited toward his child support obligation. The matter was continued until January 9, 2001, for entry of a permanent order.

Thereafter, Bartlette filed various motions in the Superior Court disputing the paternity test results. All such motions were denied. Bartlette sought to appeal the Superior Court's

² That order was not memorialized in writing until January 18, 2001.

paternity determination in this Court, and filed a notice of appeal in the Superior Court on October 8, 2002. The notice of appeal, however, was not forwarded to this Court at that time.

On November 29, 2002, after Bartlette failed to appear at a PCSD hearing a few days earlier, the Hearing Officer ordered that the Temporary Support Order would serve as the permanent order of support in Bartlette's case ("the Support Order"). Bartlette thereafter failed to make his child support payments. The Superior Court issued numerous orders for Bartlette to show cause for his child support delinquency.

On April 26, 2004, the Superior Court ordered Bartlette to furnish a supersedeas bond in the amount of \$5,557 pending the appeal of the paternity determination in *Dalmida v. Bartlette*. Bartlette filed the bond on July 12, 2004. By an order dated July 14, 2004, the Superior Court approved Bartlette's bond and stayed all proceedings in *Dalmida v. Bartlette* pending the appeal.

Bartlette's appeal of *Dalmida v. Bartlette* was filed with this Court on August 24, 2004.³ On October 14, 2004, Bartlette notified this Court that he was voluntarily abandoning the appeal. On October 15, 2004, Bartlette and Dalmida allegedly

³ See D.C. Civ. App. No. 2004-120.

entered into the Support Agreement. The agreement purportedly established a support arrangement in consideration for the dismissal of *Dalmida v. Bartlette*. However, Bartlette did not file a copy of the Support Agreement with the PCSD, the Superior Court, or this Court. This Court dismissed Bartlette's appeal by an order dated December 20, 2004.

On August 9, 2005, Bartlette moved the Superior Court to return his bond and direct the PCSD to remove any notices of his delinquency filed with any credit agencies. Bartlette argued that the bond should be returned because his appeal had been dismissed. He stated that the dismissal was evidenced by this Court's dismissal order and by an agreement between the parties. However, Bartlette did not file a copy of the Support Agreement with the Superior Court.

By September 22, 2005, a PCSD notice of noncompliance stated that Bartlette owed \$21,233.83 in overdue child support payments. On October 18, 2005, Judge Swan ordered Bartlette to show cause for his failure to meet his child support obligations. The trial judge scheduled the show cause hearing for November 9, 2005, and ordered Bartlette to bring \$7,000 to the hearing to be used for partial satisfaction of his child support obligations.

Bartlette filed the instant petition for a writ of mandamus on November 9, 2005. That same day, Bartlette personally served

the petition upon Judge Swan when he appeared at the show cause hearing. After receiving a copy of the petition, Judge Swan continued the show cause hearing, reasoning that the proceedings in *Dalmida v. Bartlette* were stayed because Bartlette had filed a notice of appeal.⁴ Apparently, Judge Swan was unaware that this Court had dismissed the appeal at Bartlette's request almost a year earlier.⁵

The petition for writ of mandamus was never served upon the PCSD or the IRB, nor was it ever properly served upon the Clerk of the Superior Court. However, the Superior Court Clerk's Office received a copy of the petition on November 9, 2005, after Bartlette served it upon Judge Swan at the show cause hearing. The PCSD requested and received a copy of the petition from the Superior Court that same day. The Support Agreement was attached as an exhibit to Bartlette's petition for a writ of mandamus. Prior to receiving Bartlette's petition on November 9, 2005, neither the Superior Court nor the PCSD received a copy of the Support Agreement.

⁴ It is unclear why Judge Swan issued the order for Bartlette to show cause in the first instance, given his view that all proceedings in *Dalmida v. Bartlette* were stayed pending appeal.

⁵ The Superior Court docket reflects that a copy of this Court's order dismissing the case was received on June 7, 2006.

This Court ordered all parties named in Bartlette's petition to file answers. In response, Judge Swan moved to dismiss the petition. Judge Swan argues that this Court lacks jurisdiction to hear the case, and that Bartlette failed to state a claim upon which relief may be granted. The PCSD filed a preliminary answer. The PCSD claims that Bartlette's petition should be denied because it is both substantively and procedurally defective.

As of the date of this Opinion, the Superior Court has not returned the bond posted by Bartlette, and Bartlette's motion for return of the bond is still pending.

II. JURISDICTION

A. Personal Jurisdiction

Virgin Islands Rule of Appellate Procedure 13 ("Rule 13"), states that a petition for a writ of mandamus must be filed with the Clerk of the Appellate Division "with proof of service on the respondent judge, on all parties to the action in the Superior Court, and on the Clerk of the Superior Court." V.I. R. APP. P. 13(a).

B. Subject Matter Jurisdiction

Where this Court has potential appellate jurisdiction over an underlying matter before the Superior Court, it has authority

to consider petitions for mandamus relief to compel judges of the Superior Court to act or to refrain from acting. See Act No. 6730 § 54(d)(1) (Omnibus Justice Act of 2005.); V.I. R. App. P. 13(a); *In re Richards*, 213 F.3d 773 (3d Cir. 2000).

III. STANDARD OF REVIEW

A writ of mandamus is an extraordinary remedy, only to be issued in "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Citibank, N.A. v. Fullam*, 580 F.2d 82, 86 (3d Cir. 1978) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)). There are three factors for consideration in determining whether the writ of mandamus should be issued: (1) there must be no other adequate means to attain the relief sought; (2) the right to issuance of the writ must be clear and indisputable; and (3) the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.⁶ *In re Pressman-Gutman Co., Inc.*, 459 F.3d 383 (3d Cir. 2006) (citing *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004)); *Dawsey v.*

⁶ But see *Dawsey v. Gov't of V.I.*, 931 F.Supp. 397, 400-01 (D. V.I. App. Div. 1996)(adding a fourth requirement of irreparable injury if the error goes unremedied where the trial court refuses to take action regarding a matter, and also qualifying the second prong to require a clear abuse of discretion amounting to a usurpation of power.)

Gov't of the V.I., 931 F. Supp. 397, 401 (D.V.I. App. Div. 1996)
aff'd, 106 F.3d 384 (3d Cir. 1996).

IV. ANALYSIS

Bartlette's petition for writ of mandamus suffers from both jurisdictional defects and substantive defects. Each is discussed separately below.

A. Jurisdictional Defects

As a threshold matter, this Court must have both personal and subject matter jurisdiction over Bartlette's petition.

1. Service of Process

In its preliminary answer to Bartlette's petition for writ of mandamus, the PCSD claims that it was never served with the petition, as required by Rule 13. Indeed, there is no proof that Bartlette's petition was ever served upon either the PCSD, the IRB, or the Clerk of the Superior Court.⁷ Therefore, as a preliminary matter, the Court will dismiss the petition without prejudice with respect to the PCSD and the IRB. *See, e.g., Umbenhauer v. Woog*, 969 F.2d 25, 30 n.6 (3d Cir. 1992) (noting

⁷ Virgin Islands Rule of Appellate Procedure 15(c) requires that all filings contain a certification of service including the date and manner of service as well as the names of the persons served. V.I. R. App. 15(c). A filing without such certification may be rejected. *Id.* Here, the petition states that it was personally delivered to all attorneys on record for all of the parties in *Dalmida v. Bartlette*. However, the three numbered spaces for the names and addresses of the persons served are completely blank, and there are no returns of service on file at all.

that dismissals for improper service of process and for insufficient process must be made without prejudice).

The effect of this procedural defect on the petition with respect to Judge Swan, however, is not entirely clear. Rule 13 is silent with respect to the consequences of failure to provide proof of service on one or more respondents in a petition for a writ of mandamus. Nonetheless, Rule 13(a) could be read to require compliance with the procedural rules before a petition can be validly made. See V.I. R. App. P. 13(a) ("Application for a writ of mandamus . . . shall be made by filing a petition . . . with proof of service").

While there is no clear guidance from the Third Circuit on this issue, there is some authority to suggest that failure to comply with the procedural requirements for filing a petition for a writ of mandamus may result in dismissal of the entire petition. See *United States v. Davis*, 953 F.2d 1482, 1498 (10th Cir. 1992) (dismissing an entire petition for a writ of mandamus for failure to comply with procedural requirements, but "without prejudice to a properly served and filed petition."); Wright & Miller, 16A Federal Practice & Procedure, Jurisdiction 3d. § 3967 (noting that procedural defects may result in the dismissal of a petition for a writ of mandamus); *In re Moses*, 2005 WL 4044536,

at *2 (D.V.I. App. Div. 2005) ("Before this Court can exercise its mandamus jurisdiction . . . the petitioner must complete service of his petition in accordance with Rule 13 of the Virgin Islands Rules of Appellate Procedure."). However, even assuming the petition is procedurally valid with respect to Judge Swan, it must fail for other reasons.

2. Relief Requested by Bartlette

Bartlette's first request is for this Court to direct Judge Swan to dismiss *Dalmida v. Bartlette*. This Court has potential appellate jurisdiction over *Dalmida v. Bartlette*, which is currently pending against Bartlette in the Superior Court. Therefore, to the extent Bartlette seeks to compel Judge Swan to act, this Court has jurisdiction to consider his first request. See V.I. R. App. P. 13(a) (providing for the "[a]pplication of writs of mandamus or of prohibition directed to a judge or judges of the Superior Court"); *In re Richards*, 213 F.3d 773, 781 (3d Cir. 2000) ("[I]t is clear that the Appellate Division of the District Court of the Virgin Islands has the power to issue writs of mandamus when it possesses the requisite appellate jurisdiction.").

Second, Bartlette petitions this Court to direct Judge Swan to order the return of his supersedeas bond. Bartlette was

required to post this bond in order to stay proceedings in *Dalmida v. Bartlette*, which was pending against him the Superior Court. Therefore, as with his first request, this Court has jurisdiction to consider Bartlette's second request.

In his third and fourth requests, Bartlette seeks to prohibit the IRB from withholding his tax returns in the amount of his child support arrears and to stop the PCSD from issuing notices to credit bureaus regard. However, these are not matters pending before the Superior Court. Rather, the IRB is required by statute to reduce income tax returns by the amount of overdue child support obligations. V.I. CODE ANN. tit. 16, § 367(a) (1986).⁸ The PCSD is also required by law to notify consumer reporting agencies of any amounts overdue on support

⁸ Title 16, section 367, of the Virgin Islands Code provides, in relevant part:

An income tax refund payable by the Virgin Islands Bureau of Internal Revenue or the U.S. Treasury Department which is otherwise due to a support obligor shall be reduced by the amount of any overdue support obligation owed by the support obligor.

16 V.I.C. § 367(a).

obligations.⁹ Both statutory requirements are collateral consequences of overdue payments that are imposed automatically after notice to the support obligor. See 16 V.I.C. §§ 366(b), 367(c). Bartlette has not alleged any deficiencies in notice, taken any action regarding these statutory provisions in the Superior Court, or made any allegation that the Superior Court has failed to perform a required duty with respect to these issues. Therefore, because these matters do not lie within "some present or potential exercise of appellate jurisdiction," this Court lacks authority to consider Bartlette's third and fourth requests. See *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1422 (3d Cir.1991)(quoting *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984)).

Based on the foregoing, this Court may only consider the merits of the first and second requests contained in Bartlette's petition, directed at the trial Judge. The Court will dismiss

⁹ Section 366 of title 16 of the Virgin Islands Code provides, in relevant part:

The Division shall report, on a quarterly basis, all child support obligors who are delinquent in the payment of child support, in an amount at least equal to the support payable for one month, to consumer reporting agencies doing business in the Virgin Islands. Any report to a consumer reporting agency shall at minimum include the name of the obligor and the amount of overdue support owed by such obligor. Updates to such reports shall also be submitted on a quarterly basis.

16 V.I.C. § 366(a).

Bartlette's petition as it relates to his third and fourth requests to direct the actions of the IRB and the PCSD.

B. Mandamus Relief

As discussed above, this Court has jurisdiction to issue a writ of mandamus with respect to two of Bartlette's requests: (1) that this Court direct the trial judge to dismiss *Dalmida v. Bartlette*, and (2) that this Court direct the trial judge to return his supersedeas bond. For each request, we must now determine whether mandamus relief is appropriate.

1. Dismissal of *Dalmida v. Bartlette*

Bartlette argues that the Court should direct Judge Swan to dismiss *Dalmida v. Bartlette* - brought to recover arrears owed under the Support Order - based on this Court's recognition of the validity of his Support Agreement. However, detailed statutory requirements govern child support matters in the Virgin Islands, including the official recognition of voluntary agreements to provide support.¹⁰ See 16 V.I.C. § 341 *et. seq.*

¹⁰ Note that the Virgin Islands Code provides that mandatory guidelines for determining the amount of support payments must be applied "[i]n any proceeding to establish or modify a child support obligation," and "shall extend to proceedings setting child support amounts pursuant to agreement, stipulation or consent." 16 V.I.C. § 345(b).

A party seeking to replace a support order with a voluntary agreement may move for modification of the order. 16 V.I.C § 369(e). However, motions to modify or adjust support orders must be made to the Superior Court or the Administrative Hearing Office. 16 V.I.C. § 369(e). Despite Bartlette's numerous motions contesting paternity, he has moved either the PCSD or the Superior Court to dismiss the Support Order based on the Support Agreement.¹¹ Nothing in the statute prevents him from making such a motion, and he has not alleged any valid reason for failing to do so in his petition.¹² *Id.*

If Bartlette seeks review of the Support Order through the appropriate (and in fact mandatory) procedures, then the PCSD may

¹¹ The petition states that Bartlette provided the PCSD with a copy of the Support Agreement, but there is no evidence to support this claim, and the PCSD denies ever receiving a copy (until requesting a copy of this petition from the Superior Court). Additionally, there is no record that this agreement was ever filed in the Superior Court.

¹² Bartlette also states in his petition that he was advised by the PCSD that "they would not recognize the agreement and any payments would be considered a gift." However, as discussed in note 13, *supra*, there is no proof that Bartlette ever filed the Support Agreement with the PCSD. Moreover, the Support Order (which Bartlette neglected to attach to his petition) states that "any money or payment of any kind which the Respondent may give directly to the Petitioner or the parties' child shall be considered a gift and the Respondent shall not be given credit toward his child support obligation herein." The Support Order was issued in the year 2000 and made permanent in 2002, long before the Support Agreement was created. Therefore, it appears from the facts presented to the Court that the above quoted statement of his petition may actually refer to this clause of the Support Order instead of a communication he had with the PCSD.

determine he is not in arrears and that the Support Agreement may replace the Support Order. Thereafter, the PCSD may itself move to dismiss *Dalmida v. Bartlette*.

Therefore, not only does Bartlette have an adequate means of achieving dismissal of *Dalmida v. Bartlette*, but he is in fact required to exhaust his administrative remedies through these avenues. See 16 V.I.C. § 369(e). Accordingly, mandamus relief is inappropriate, and the Court will deny Bartlette's petition insofar as it seeks an order directing Judge Swan to dismiss *Dalmida v. Bartlette*.

2. Return of the Supersedeas Bond

Bartlette additionally petitions this Court to direct Judge Swan to immediately return the supersedeas bond that he posted pursuant to his appeal, which he voluntarily abandoned shortly after filing the notice of appeal. Bartlette argues that mandamus relief is appropriate with respect to his second request because the Superior Court has not yet returned his bond, despite being provided with notice that the appeal has been dismissed, and despite the fact that Bartlette filed a motion for return of the bond.

Bartlette posted his bond in order to perfect his appeal and stay proceedings in *Dalmida v. Bartlette* pending against him in

the Superior Court. The rules of procedure governing this Court permit the Superior Court to require an appellant in a civil case to file a bond "in such form and amount as it finds necessary to ensure payment of costs on appeal, including attorney's fees, pursuant to the applicable Rules of the Territorial Court." V.I. R. App. P. 8(a).

The applicable Superior Court Rule provides:

The court may require any person who shall be adjudged guilty or convicted of an offense or against whom a judgment has been rendered to give a cash bond or bond with good and sufficient sureties in such form as the court shall order, to secure the payment of any sum awarded by the court.

V.I. Super. Ct. R. 110.

Neither the rules of the Superior Court nor the Rules of this Court, however, address the circumstances under which such bonds must be returned. However, dismissal of an appeal that did not result in an affirmation or modification of the judgment does not preclude satisfaction of judgment out of the supersedeas bond filed by the defendant. *Tully v. Kerguen*, 304 F. Supp. 1225, 1226 (D.V.I. 1969) (noting that "this is the very object of the bond.") Therefore, the fact of Bartlette's voluntary dismissal of his appeal does not clearly require that his bond be returned. Accordingly, Bartlette cannot show a clear right to the return of

his bond, and mandamus relief is inappropriate with respect to his second request.

V. CONCLUSION

Based on the foregoing, the Court will deny Bartlette's petition in its entirety. Furthermore, although Bartlette did not specifically ask this court to compel Judge Swan to rule on his motion for return of the bond, the Court notes that this motion has been pending for over a year. We are confident that the Superior Court will rule on this motion promptly. However, in the event the Superior Court fails rule on Bartlett's motion for the return of his bond, this panel will retain jurisdiction to hear a future petition for relief. An appropriate judgment follows.

ENTERED: January 24, 2008.

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Copies:

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Hon. Raymond L. Finch, District Court Judge
Hon. Julio A. Brady, Superior Court Judge
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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

IN RE: THEODORE BARTLETTE,

 Petitioner

concerning

GOVERNMENT OF THE VIRGIN ISLANDS
DEPARTMENT OF JUSTICE, for BARBARA) D.C. Civ. App. No. 2005-187
DALMIDA, and) Re: Fam. Ct. No. S60/1999

INTERNAL REVENUE BUREAU,

 Respondents.

and

HON. IVE ARLINGTON SWAN,

 Nominal Respondent.

Petition for Writ of Mandamus to the Superior
Court of the Virgin Islands

Considered: March 9, 2007
Filed: January 24, 2008

BEFORE: CURTIS V. GÓMEZ, Chief Judge of the District Court of the Virgin Islands; RAYMOND L. FINCH, Judge of the District Court of the Virgin Islands; and JULIO A. BRADY, Judge of the Superior Court of the Virgin Islands, Division of St. Croix, sitting by designation.

In Re: Theodore Bartlette
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Verne A. Hodge, Jr., Esq.
St. Thomas, U.S.V.I.
For nominal respondent Hon. Ive Arlington Swan

JUDGMENT

PER CURIAM,

Petitioner Theodore Bartlette ("Bartlette") has filed a petition for a writ of mandamus. For the reasons explained in the accompanying Memorandum Opinion of even date, it is hereby

ORDERED that the petition is **DENIED**.

ENTERED: January 24, 2008.

In Re: Theodore Bartlette
Civil No. 2005-187
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Copies:

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